No. 76-315

In the Supreme Court of the United States

OCTOBER TERM, 1976

WISCONSIN VALLEY TRUST CO. AND PRISCILLA BAKER (LANE) STEFFKE, CO-EXECUTORS OF THE ESTATE OF WESLEY A. STEFFKE, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
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The question presented in this federal estate tax case is whether decedent's bequest to a woman he "married" after she obtained an invalid Mexican divorce from her first husband was a bequest to a "surviving spouse" within the meaning of the marital deduction provisions of Section 2056 of the Internal Revenue Code of 1954 (26 U.S.C.). Both the Tax Court (Pet. App. B 16-31) and the court of appeals (Pet. App. A 1-15) held that the decedent's bequest was ineligible for the estate tax marital deduction because it was not made to a "surviving spouse."

The pertinent facts are as follows: In January 1967, decedent, Wesley A. Steffke, executed a will, leaving a large portion of his estate to his "friend, Priscilla Baker Lane." Later that same year, decedent and Priscilla were

"married" in a Wisconsin wedding ceremony. Priscilla had been previously married to Crockett W. Lane. In 1966, however, at a time when both she and Crockett were domiciliaries and residents of Wisconsin, Priscilla entered a personal appearance in a Mexican court and requested that court to grant her a divorce. Crockett appeared in the Mexican proceeding through counsel and thereafter the Mexican court entered a judgment of divorce. However, the Mexican divorce was granted on grounds not recognized under Wisconsin law (Pet. App. A 2).

Decedent Wesley Steffke died approximately a year and a half after he "married" Priscilla. At the time of his death, decedent was a resident of Wisconsin and his estate was administered under the laws of that state. Following his death, the Supreme Court of Wisconsin held that Priscilla's Mexican divorce from Crockett W. Lane was of no effect in Wisconsin and that Priscilla was not the wife of decedent under Wisconsin law. See *In re Estate of Steffke*, 65 Wis. 2d 199, 207, 222 N.W. 2d 628, 633. The effect of this decision, rendered in the context of a state inheritance tax proceeding, was that Priscilla did not qualify as decedent's widow for state inheritance tax purposes. Thus, property passing to her from decedent's estate was taxed at a higher rate (Pet. App. A 2).

The decedent's estate claimed the marital deduction for the bequest to Priscilla on the federal estate tax return it filed. On audit, the Commissioner determined that Priscilla was not decedent's "surviving spouse" within the meaning of the marital deduction provisions of Section 2056 of the Code. In a reviewed decision, the Tax Court unanimously upheld the Commissioner's determination (Pet. App. B 16-31). The court of appeals affirmed on the ground that the decision of the Wisconsin Supreme Court controlled decedent's marital status for federal estate tax purposes (Pet. App. A 1-15).

1. The decision below correctly held that the decedent's bequest to Priscilla was not a bequest to a "surviving spouse" for purposes of the estate tax marital deduction. Section 2056 of the Code generally provides that an estate may claim a deduction for the "value of any interest in property which passes or has passed from the decedent to his surviving spouse." The statute does not define the term "surviving spouse." Accordingly, pursuant to his authority under Section 7805(a) of the Code to "prescribe all needful rules and regulations," the Commissioner has announced that he will generally look to the law of the decedent's domicile to determine his marital status. See Rev. Rul. 67-442, 1967-2 Cum. Bull. 65.

Here, under the law of decedent's domicile, Wisconsin, the highest court of the state held that Priscilla did not qualify as decedent's "widow." Under these circumstances, the Commissioner properly looked to that decision as controlling on the question of decedent's marital status. He therefore correctly determined that decedent's bequest to Priscilla was not a bequest to a "surviving spouse" for purposes of the federal estate tax marital deduction.

2. Like petitioners in *Estate of Goldwater* v. *Commissioner*, 539 F. 2d 878 (C.A. 2), petition for a writ of certiorari pending, No. 76-438, petitioners contend (Pet. 4, 7) that the rule of *Borax' Estate* v. *Commissioner*, 349 F. 2d 666 (C.A. 2), certiorari denied, 383 U.S. 935, requires that Priscilla be deemed to be decedent's "surviving spouse" for purposes of the marital deduction. But as the court of appeals here recognized (Pet. App. A 7), the Second Circuit has confined the application of its *Borax* decision to the income tax alimony deduction provisions at issue in that case. Thus, for the reasons we have more fully set forth in our memorandum in opposition in *Estate of*

Goldwater,[1] the courts of appeals have uniformly upheld the Commissioner's position of looking to the law of the decedent's domicile in determining his marital status for federal estate tax purposes. There is accordingly no conflict of decisions warranting review by this Court.[2]

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1976.

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[1]We are serving a copy of our memorandum in opposition in *Estate of Goldwater* (No. 76-438) upon counsel for the petitioners.

[2]*Estate of Spalding* v. *Commissioner*, 537 F. 2d 666 (C.A. 2), does not reject the rule urged by the Commissioner in these cases that the law of the decedent's domicile should govern his marital status for tax purposes. There, the courts of the decedent's domicile had not spoken on the question of the validity of her husband's Nevada divorce and the Second Circuit was unwilling to assume that the California courts would have held the divorce to be invalid even though a New York court had held it invalid. Absent such a determination, the Nevada divorce stood unimpeached, even though it was likely that a California court would have annulled it by giving full faith and credit to the New York judgment, had the question of the validity of the Nevada divorce been presented to a California court. Cf. *Borax' Estate* v. *Commissioner*, *supra*, 349 F. 2d at 676 (Friendly, J., dissenting).

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